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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

AMAN TESFAY BERHE,

Defendant and Respondent.

A132084

(Sonoma County
Super. Ct. No. SCR-593034)

I. INTRODUCTION

Defendant Aman Tesfay Berhe was charged with transportation and possession for sale of substantial amounts of marijuana. (Health & Saf. Code, §§ 11359 and 11360, subdivision (a).) He was also charged with active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a))¹ under the Street Terrorism Enforcement and Prevention Act of 1988 (the STEP Act) (§ 186.20 et seq.). After the preliminary hearing, Berhe moved for dismissal of the section 186.22, subdivision (a), count. The trial court discharged defendant as to that count and the trial court upheld this ruling. The People now challenge the dismissal of the section 186.22, subdivision (a), count on the ground that the trial court erred in finding that that section could not be violated by a criminal street gang member who was the sole perpetrator of the underlying felony.

We agree with the People and hence reverse the trial court.

¹ All further statutory references are to the Penal Code, unless otherwise noted.

II. FACTUAL AND PROCEDURAL BACKGROUND

The following brief summary of the facts is taken from the preliminary hearing transcript. After Berhe bought one pound of marijuana for \$2,000 from a confidential informant, and a search of his house resulted in the seizure of four pounds of marijuana belonging to him, Berhe was arrested and charged with two counts of unlawful possession of marijuana for sale (Health and Saf. Code, § 11359), two counts of unlawful importation and transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), and one count of violating section 186.22, subdivision (a). At the preliminary hearing, there was testimony that defendant was an active Crips gang member, had gang tattoos, acknowledged his Crips membership, which he sought to conceal from the police, flashed gang signs and possessed firearms.

At the preliminary hearing, the magistrate did not hold Berhe to answer to count 3, the violation of section 186.22, subdivision (a). Berhe moved for dismissal of that count and the magistrate discharged defendant as to that count. The trial court upheld this ruling.

This timely appeal by the People followed.

III. DISCUSSION

At the conclusion of the preliminary hearing, the magistrate ruled, “there has been evidence that certainly supports a reasonable suspicion that Berhe is a member of the Crips. There has been sufficient evidence to support a finding that the Crips are a criminal street gang. . . . [T]here also is sufficient evidence that [Berhe] participated in possession for sale and sale of marijuana. However, I do not feel that acting alone without any kind of implication [sic] that another gang member is involved falls within the confines of 186.22(a) in that this activity does not promote, further or assist in felony criminal conduct by gang members. . . . I have no evidence before me that it was—this activity was to promote, further or assist in felony criminal conduct by gang members.”

Section 186.22, subdivision (a), provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in

any felonious conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison” In *People v. Albillar* (2010) 51 Cal.4th 47, 55 (*Albillar*), our Supreme Court explained that section 186.22, subdivision (a), “target[s] the scourge of gang members committing *any* crimes together and not merely those that are gang related. Gang members tend to protect and avenge their associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation. ‘These activities, both individually and collectively, present a clear and present danger to public order and safety’ (§ 186.21.)”

There is no dispute that the magistrate found sufficient evidence that defendant “actively participates in any criminal street gang” and “has knowledge that its members engage in or are engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (a).) The issue, then, is whether defendant, through his own felonious actions, can be found to “willfully promote[], further[] or assist[] in any felonious criminal conduct by members of that gang” Specifically, can a gang member, acting alone, be charged with a violation of section 186.22, subdivision (a)?

In *Albillar*, *supra*, 51 Cal.4th at page 59, three gang members individually perpetrated a rape and were found guilty of violating section 186.22, subdivision (a). We see no reason that an individual who perpetrated a felony should be treated any differently. Through his actions, a single perpetrator, like multiple perpetrators “promotes” and “furthers” “felonious criminal conduct.”

In *People v. Ngoun* (2001) 88 Cal.App.4th 432, 434-436 (*Ngoun*), the court held that a gang member who is the sole perpetrator of a felony is subject to section 186.22, subdivision (a). The court reasoned that “[g]iven the objective and intent of subdivision (a), we find good reasons not to construe section 186.22, subdivision (a), in the restricted manner advocated by appellant and instead to conclude that this subdivision applies to the perpetrator of felonious gang related criminal conduct as well as to the aider and

abettor. . . . In common usage ‘promote’ means to contribute to the progress or growth of; ‘further’ means to help the progress of An active gang member who directly perpetrates a gang related offense ‘contributes’ to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity.”

After *Ngoun*, the two courts to consider this issue in published opinions have also agreed that section 186.22, subdivision (a), applies to a gang member who is the sole perpetrator of “felonious conduct.” (*People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*); *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*).)² We find the reasoning in these cases persuasive and adopt it here.

Defendant makes a number of contrary arguments that have been addressed and rejected in previous cases. First, defendant contends that the felonious conduct required under section 186.22 must be gang-related, i.e., for the gang’s benefit. That claim was rejected in *Albillar, supra*, 51 Cal.4th at page 51 (it is sufficient that a gang member promotes, furthers or assists *any* criminal conduct). Similarly, there is no requirement under section 186.22, subdivision (a), that the felonious conduct with which the gang member is charged must be one of the gang’s “primary activities.” We agree with the People that no such requirement exists under section 186.22, subdivision (a), and that any reference to “primary activities” contained in section 186.22, subdivision (f), refers to the gang’s activities rather than the felonious conduct which 186.22, subdivision (a), criminalizes.

² Our Supreme Court has granted review of a case that reached the opposite conclusion, *People v. Rodriguez* (2010) 188 Cal.App.4th 722, review granted January 12, 2011, S187680, and has also granted review of *People v. Cabrera* (2010) 191 Cal.App.4th 276, review granted March 23, 2011, S189414 and *People v. Gonzales* (2011) 199 Cal.App.4th 219, review granted December 14, 2011, S197036 that follow *Salcido* and *Sanchez*.

Second, defendant argues that language in *People v. Castenada* (2000) 23 Cal.4th 743 supports his position that a perpetrator, acting alone, cannot violate section 186.22, subdivision (a). However, the *Castenada* court did not have before it the issue of whether a defendant who is the sole perpetrator of a felony can be charged with a violation of section 186.22, subdivision (a), and, therefore, any language defendant points to in that case is dictum. Further, as the *Ngoun* court pointed out: “As we read *Castenada*, it does not stand for the proposition that only an aider and abettor is subject to liability under section 186.22, subdivision (a) and . . . it would be a misconstruction of the statutory language and a perversion of the legislative intent to read the subdivision in such a narrow manner.” (*Ngoun, supra*, 88 Cal.App.4th at p. 437, see also *Salcido, supra*, 149 Cal.App.4th at pp. 367-371, and *Sanchez, supra*, 179 Cal.App.4th at pp. 1306-1307.)

In sum, defendant has provided us with no reason to find that section 186.22, subdivision (a), does not apply to the sole perpetrator of felonious activity.

IV. DISPOSITION

The trial court’s order dismissing count 3 is reversed.

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.